Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-75-75

ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES.
FRANZ LANGE G.m.B.H. & CO.,
K.G.

v.

NORTHERN METAL CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1975.

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No. 75- .

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ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES.
FRANZ LANGE G.m.B.H. & CO.,

v.

NORTHERN METAL CO.,

Respondents.

—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

———

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert H. Lucas, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit, entered in the above case on April 30, 1975, granting respondents' motion to dismiss petitioner's appeal from an order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS OF THE COURTS BELOW.

The United States Court of Appeals for the Third Circuit did not grant any hearing and filed no opinion in support of its Order of April 30, 1975, which granted respondents' motion to dismiss the appeal. Said Order is printed, *infra* (Appendix B, p. A3). The Order of the United States District Court for the Eastern District of Pennsylvania, filed January 21, 1975, denying motion for certification of order of December 30, 1974, is unreported. Said Order is printed, *infra* (Appendix E, p. A18). The Opinion of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, is unreported. Said Opinion is printed, *infra* (Appendix D, p. A7). The Order of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, denying plaintiff's motion to strike defendants' affirmative defense and denying defendants' motion for certification, is unreported. Said Order is printed, *infra* (Appendix C, p. A5).

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal was entered on April 30, 1975, *infra* (Appendix B, p. A3). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1) and the All Writs Statute, 28 U. S. C. A. § 1651.

QUESTIONS PRESENTED.

1. Whether the Trial Court's order dismissing the cause of action based on the warranty of seaworthiness was final and subject to appeal.

2. Whether the statute which eliminated the warranty of seaworthiness was in violation of the United States Constitution and, therefore, invalid.

STATUTES INVOLVED.

The statutory provisions involved are 28 U. S. C. A. § 1291; and 33 U. S. C. A. § 905(b). Said provisions are printed, *infra* (Appendix A, p. A1).

STATEMENT UNDER RULE 33(b)(2).

Since the proceeding draws into question the constitutionality of the Act of March 4, 1927, c. 509, § 5, 44 Stat. 1426, as amended October 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263, 33 U. S. C. § 905(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U. S. C. § 2403 may be applicable.

The United States District Court for the Eastern District of Pennsylvania has, on December 4, 1974, pursuant to 28 U. S. C. § 2403, certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE.

On January 26, 1973, petitioner, while engaged in unloading the S/S "Brinknes", stepped on a timber holding the cargo, when the timber broke, causing him to fall and sustain serious injury. Petitioner alleged in his complaint that the injuries were due (1) to the cause of action based on unseaworthiness; and (2) to the cause of action based on negligence. Respondents averred in reply that the cause of action for unseaworthiness was barred by the amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 905(b). Petitioner moved to strike defendants' affirmative defense, and this motion was denied by the trial court. Petitioner then filed a motion to certify the order denying petitioner's motion to strike and this motion was denied. Petitioner appealed to the United States Court of Appeals for the Third Circuit, and respondents moved to dismiss the appeal on the ground that the order of the District Court was interlocutory. Respondents' motion dismissing the appeal was granted on April 30, 1975.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Dismissal of the Cause of Action for Unseaworthiness Was a Final Order for the Purpose of Appeal, Under This Court's Decision in Gillespie v. United States Steel Corp., 379 U. S. 148.

In *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 13 L. Ed. 2d 199 (1964), the administratrix filed a complaint for the death of her son, under the Jones Act, 46 U. S. C. A. 688, and under the Ohio Wrongful Death Act, for negligence and unseaworthiness. On motion to dismiss before trial, the district court struck all parts of the complaint referring to unseaworthiness and left standing the negligence count. This decision was affirmed by the Court of Appeals and by this Court, holding that the decision dismissing the cause of action for unseaworthiness was a "final" one for the purpose of appeal.[1] In determining the "finality" of the order dismissing the count for unseaworthiness and holding it to be "final" under 28 U. S. C. A. 1291, this Court stated:

> ". . . [T]he requirement of finality is to be given a 'practical rather than a technical construction.' . . . It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered." (U. S. at 152-53, L. Ed. at 203)

1. The decision on the merits was subsequently reversed by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 26 L. Ed. 2d 339 (1970), where this Court held that a cause of action for death arose under the general maritime law.

Moreover, this Court went even further than it need go in this case, stating:

> "Furthermore, in United States v. General Motors Corp., 323 U. S. 373, 377, 89 L. ed. 311, 318, 65 S. Ct. 357, 156 ALR 390, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was 'fundamental to the further conduct of the case.' For these same reasons this Court reviewed such a ruling in Land v. Dollar, 330 U. S. 731, 734, note 2, 91 L. ed. 1209, 1214, 67 S. Ct. 1009, and Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 685, note 3, 93 L. ed. 1628, 1633, 69 S. Ct. 1457, where, as here, the case had not yet been fully tried. And see Cohen v. Beneficial Industrial Loan Corp., supra, 337 U. S., at 545-547, 93 L. ed. at 1535, 1536. We think that the questions presented here are equally 'fundamental to the further conduct of the case.'" (U. S. at 153-54, L. Ed. at 203-04)

Clearly, the Court below should have taken jurisdiction and decided the merits for the reasons advanced by this Court in *Gillespie* (1) that the term "final" must be given a practical rather than a technical construction; and (2) because the issues presented here are fundamental to the conduct of the case.

II. The Elimination of the Warranty of Seaworthiness in the Amendment to the Longshoremen's and Harbor Workers' Compensation Act Destroyed a Vital Part of the Maritime Law, in Violation of Article III, Section 2 of the Constitution of the United States and Is Directly Contrary to Panama R. R. v. Johnson, 264 U. S. 375.

The warranty of seaworthiness was held to apply generally to seamen in this Court's decision in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 88 L. ed. 561 (1944). There, this Court held:

> ". . . [T]he admiralty rule that the vessel and owner are liable to indemnify a seaman for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in The Osceola, supra (189 U. S. 175, 47 L. ed. 764, 23 S. Ct. 483); . . ." (U. S. at 99, L. ed. at 564)

The term "seaman" was held by this Court to include longshoremen and others performing the services of seamen on board ship. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. ed. 157 (1926).

The question as to whether longshoremen were "seamen", entitled to the warranty of seaworthiness, was decided in the affirmative by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. ed. 1099 (1946). There, this Court held:

> "That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them

to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault." (U. S. at 93, L. ed. at 1105).

This brings us to the key question of whether the changing of a vital part of the maritime law may be done by statute. In *Panama R. R. v. Johnson*, 264 U. S. 375, 68 L. ed. 748 (1924), the Jones Act, 46 U. S. C. A. 688, which enhanced the cause of action for negligence under the maritime law, was challenged by the shipowner on the ground that the maritime law could not be modified or changed except by Constitutional amendment. In reviewing the law, this Court pointed out in *Panama* that by Article III, Section 2, the Constitution of the United States adopted and incorporated the general maritime law.

"As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce.

In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion." (U. S. at 385-86, L. ed. at 752.)

At this point, this Court defined the boundaries within which Congress may act to alter the maritime law as stating that it could not by legislation exclude anything falling clearly within the law, or include anything falling clearly without, as follows:

". . . [T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and *cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without.*" (U. S. at 386, L. ed. at 752.) (Emphasis supplied.)

In holding the Jones Act constitutional, this Court stated that the Act did not change the characteristic features of the maritime law:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system." (U. S. at 388-89, L. ed. at 753.)

The warranty of seaworthiness is one of the most vital features of the maritime law, and its elimination necessarily is in conflict with and destructive of the maritime law, completely contrary to the mandate of this Court in *Panama R. R. v. Johnson, supra.* The amendment to the Longshoremen's and Harbor Workers' Compensation Act, insofar as it eliminated the warranty of seaworthiness, is in direct violation of the Constitution of the United States and must, therefore, be held invalid.

CONCLUSION.

The decision below will erroneously result in the dismissal of many thousands of longshoremen's cases around the country every year. Certiorari is absolutely essential to the end that the decision be reviewed by this Court, in order that justice be done. Certiorari should be granted, and the decision below reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.

APPENDIX A.

28 U. S. C. A.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

33 U. S. C. A.

§ 905(b). In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the

injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
As amended Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

APPENDIX B.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 75-1223-4

——

April 18, 1975

ROBERT H. LUCAS,
Appellant in No. 75-1223

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.b.H. & Co., K.G.

v.

NORTHERN METAL COMPANY (3RD PTY. DEFT.)
"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & CO., K.G., DEFENDANT-THIRD PARTY PLAINTIFF,
Appellant in No. 75-1224

(D. C. Civil No. 73-1120)

Present: VAN DUSEN, ADAMS and GARTH, *Circuit Judges.*

1. Motion by Cross-appellant, "Brinknes" Schiffahrts Ges. Franz Lange G.m.b.H & Co., K.G., to dismiss appeal of appellant in No. 75-1223, Robert H. Lucas, *or,* in the alternative, to extend time for filing brief and the appendix until 40 days after the Court has acted on this motion, *and* further moves this Court for an Order dismissing all of the appeals in Nos. 75-1220, 75-1221, 75-1223

and 75-1224, and remanding the records to the District Court for further proceedings leading to a final judgment to be entered by the District Court,

2. Answer by appellant in No. 75-1223, Robert H. Lucas, to motion by Cross-appellant to dismiss appeal in No. 75-1223,

3. Answer by appellee, Northern Metal Company, to motion of Cross-appellant to dismiss appeals, stating supports motion to dismiss appeals in Nos. 75-1220, 75-1221, 75-1223 and 75-1224,

in the above listed for Monday, April 28, 1975.

Respectfully,

/s/ THOMAS F. QUINN
Clerk

enc.
fm

P.S. On April 15, 1975 the Clerk granted Stipulation of counsel that the decision in No. 75-1223 will be binding upon Nos. 75-1220 and 75-1221, D. C. Civil No. 73-2150.

The foregoing Motion is granted and the records are remanded to the district court.

By THE COURT,

/s/ VAN DUSEN
Judge

Dated: April 30, 1975

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & CO. K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

ORDER.

Now, December 30, 1974, IT IS ORDERED:

In Civil Actions Nos. 73-1120 and 73-2150,

(a) the motion of plaintiffs to strike the defendants' affirmative defense denying liability under the warranty of seaworthiness is DENIED.

(b) the motion of defendants for certification to the Third Circuit under 28 U. S. C. § 1292(b) is DENIED.

/s/ JOSEPH S. LORD, III,
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO,
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD,
Daniel H. Huyett, 3rd
J.

APPENDIX D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & Co., K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

BEFORE: JOSEPH S. LORD, III, *Chief Judge*
ALFRED L. LUONGO, *Judge*
DANIEL H. HUYETT, 3RD, *Judge* *

* A panel of three District Court judges was convened by Chief Judge Lord to consider these cases because of the number of cases pending in the Eastern District of Pennsylvania which have issues identical to the issues raised in these cases. This procedure will provide for uniformity of treatment of the issues involved even though a single district judge is not actually bound by our ruling in these cases. *See Turner v. Transportacion Maritima Mexicana S. A.*, 44 F. R. D. 412, 414 n. 1 (E. D. Pa. 1968).

OPINION.

HUYETT, *J.* December 30, 1974

Before us is a series of motions[1] in two admiralty actions arising out of shipboard injuries to longshoremen. These motions test the constitutionality of 33 U. S. C. § 905(b),[2] one of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. amended (Supp. II 1972).

1. In an earlier memorandum resolving another series of pretrial motions filed in these actions, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G. m. B. H. & Co., K. G.*, 379 F. Supp. 759 (E. D. Pa. 1974), we held that § 905(b) of Title 33, as amended, precluded any actions for indemnity or contribution by shipowners against stevedores arising out of injuries to the stevedores' employees. For a discussion of the history of the different rights and remedies treated in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. as amended (Supp. II 1972), *see Lucas I* at 761-65.

2. 33 U. S. C. § 905(b) as amended (Supp. II 1972) reads:

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair service to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. (Emphasis added)

MOTION TO STRIKE.

By a motion to strike defendant shipowners' affirmative defense denying liability under the warranty of seaworthiness, plaintiffs question the power of Congress to eliminate through § 905(b) a longshoreman's right to recover under the warranty of seaworthiness conferred on him in *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). We deny the motion to strike.

Plaintiffs argue that Congress exceeded its constitutional authority under Article III, section 2,[3] when it eliminated the warranty of seaworthiness as a basis upon which longshoremen can recover.[4] Their argument relies heavily on the following excerpt from a passage in *Panama Railway Co. v. Johnson*, 264 U. S. 375, 386 (1924):

> [T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.

Plaintiffs point out that this language of limitation is echoed in subsequent Supreme Court cases.[5] Such limiting

3. Article III, section 2, reads in part:

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

4. The Supreme Court first afforded seamen the right to recover under a warranty of seaworthiness in *The Osceola*, 189 U. S. 158 (1903). To recover under the warranty, however, the seaman had to establish that the shipowner had breached a duty of reasonable care and that his injury did not result from the negligence of the master or crew. In 1944, the Court transformed the liability arising from a breach of the warranty of seaworthiness into an absolute, non-delegable liability. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944). Then, two years later the Court granted longshoremen the right to recover under a warranty of seaworthiness. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946).

5. In *Crowell v. Benson*, 285 U. S. 22 (1932), the Supreme Court upheld the constitutionality of the original Longshoremen's

language, plaintiffs contend, precludes Congress from eliminating this "most substantial and most important" admiralty remedy, the warranty of seaworthiness.[6]

Since plaintiffs rely so strongly on *Panama Railway Co. v. Johnson*, we start by examining the lengthy passage

5. (Cont'd.)
and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq. (1970). The Court quoted the following language from Chief Justice Taney's opinion in *The Genesee Chief*, 53 U. S. (12 How.) 443, 459 (1851):

> But the extent of the power as well as the mode of proceeding in which [admiralty] jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language.

285 U. S. at 53. In *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934), the Court upheld the Ship Mortgage Act, 46 U. S. C. §§ 911-984 (1970) (§ 973 as amended (Supp. I 1971)), which conferred on federal admiralty courts jurisdiction over actions to enforce the lien of a "preferred" mortgage on a ship, the term "preferred" being defined by the Act. The Court concludes a paragraph in which it outlines the broad power of Congress to determine maritime law by stating:

> But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.

293 U. S. at 44.

6. Plaintiffs seem to suggest that the lineage and antiquity of the warranty of seaworthiness are so compelling that Congress cannot, constitutionally exclude it. At the risk of mentioning the obvious, we note that the Supreme Court did not feel compelled to grant even a limited right of recovery under the warranty of seaworthiness until 1903. *The Osceola*, 189 U. S. 158 (1903). The warranty did not apply to longshoremen, the only group to which it has been denied under § 905(b), until 1946. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). On a grander scale, plaintiffs suggest that there exists, and existed at the time of the adoption of the Constitution, a core of substantive maritime law, including the warranty of seaworthiness, with which Congress cannot tamper. This notion we reject. We adopt the Supreme Court's statement in *The Lottawana*, 88 U. S. (21 Wall.) 558, 572 (1875), that "it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country."

from *Panama* of which the language cited by plaintiffs comprises a sentence. The passage begins with a long section in which the Court acknowledges the necessarily broad discretion of Congress to legislate in the area of substantive maritime law.[7] In discussing the nature of Article III, section 2, the Court states

> Although containing no express grant of legislative power over the substantive law, the provision [Article III, section 2] was regarded from the beginning as implicitly investing such power in the United States. Commentators took this view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superceded or as being only the law of the several States, but as having become the law of the United States, . . . subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

7. Although there is no conflict among the Supreme Court cases on the broad discretion of Congress to enact maritime law, there is some disagreement as to where in the Constitution this power is grounded. The Court in *The Lottawana*, 88 U. S. (21 Wall.) 558, 577 (1875), found the source of congressional power to be Article I, section 8, cl. 3, the commerce clause. In *Panama Railway Co. v. Johnson*, 264 U. S. 382, 387 (1924), and *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 42 (1934), the Court found the source to be Article I, section 8, cl. 18, the necessary and proper clause. Finally, in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 39 (1943), the Court identified both the commerce clause and the necessary and proper clause as the source of congressional power.

264 U. S. at 386. Immediately following this discussion, the Court does identify two constitutional limits on the legislative power. The first limit is the one invoked by plaintiffs—"that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects." *Id.* The second limit, and one the Court has acted upon, restrains Congress from enacting legislation which undermines the uniformity of maritime law and thereby contravenes the constitutional policy upon which a federal maritime law is based.

This second limit on the national Congress, and in one case on the New York legislature, led the Court to strike down several legislative schemes in a line of cases just prior to *Panama Railway Co. v. Johnson.* In *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917), *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149 (1920), and *Washington v. Dawson & Co.,* 264 U. S. 219 (1924), the Court declared unconstitutional under Article III, section 2, an attempt by the New York legislature and two attempts by the national Congress respectively to apply state workmen's compensation schemes to maritime injuries. The Court struck down these attempts because maritime law is constitutionally designated federal law and must be uniform wherever the Constitution reaches.

Plaintiffs do not suggest in their briefs that § 905(b) exceeds this second limit. They argue instead that denial to longshoremen of the warranty of seaworthiness exceeds the first limit, the one imposed by the inherent nature of the subject. With this theory we cannot agree. Despite

8. Although the *Panama* Court uses the phrase "maritime law and admiralty jurisdiction," we suspect the Court intended only to echo the constitutional phrase but inserted the word "law" for a nicer rhetorical balance. The Constitution refers only to "maritime and admiralty Jurisdiction." We cannot attribute to the Court's use of the word "law" the significance which the plaintiffs urge.

the use of the conjunctive "maritime law and admiralty jurisdiction" in the excerpt on which plaintiffs rely, we conclude that the language of limitation under discussion places boundaries on congressional power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies.[9] We base our conclusion on several considerations. As we have already suggested, the language from *Panama Railway Co. v. Johnson* that plaintiffs cite is but a short excerpt from a long passage the predominant theme of which is the broad range of congressional discretion to alter and amend maritime law. This pattern, limiting language sounding a minor theme in a case in which the major theme is the wide-ranging congressional power to enact maritime law, is repeated in *Crowell v. Benson,* 285 U. S. 22 (1932), and *Deroit Trust Co. v. The Thomas Barlum,* 293 U. S. 21 (1934), two other cases upon which plaintiffs rely. Further, in *Panama Railway Co. v. Johnson* and *Crowell v. Benson,* the Court upheld the federal legislation under constitutional attack despite thoroughgoing congressional rearrangement of substantive maritime remedies. In *Panama Railway v. Johnson* the Court upheld the consti-

9. We do not imply here that congressional discretion to expand or contract admiralty jurisdiction is narrowly restricted. In a line of cases in the first decade of this century, *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.,* 203 U. S. 316 (1908); *The Troy,* 208 U. S. 321 (1908); and *Martin v. West,* 222 U. S. 191 (1911), the Supreme Court refused recovery in admiralty when a ship or its gear caused damage to persons ashore or to shore-based property. In 1948 Congress passed the Admiralty Extension Act 1948, 46 U. S. C. § 740 (1970), which in effect overruled this line of cases conferring jurisdiction in admiralty for these kinds of accidents. Although the Supreme Court has never ruled directly on the constitutionality of the Act, the Court in *Victory Carriers, Inc. v. Law,* 404 U. S. 202, 209-210 (1971), recounts this legal history with apparent equinimity and reports that "[t]he [Admiralty Extension Act] survived constitutional attack in the lower federal courts and was applied without question by this Court in *Gutierrez.* . . ." (citations omitted).

tutionality of the Jones Act, 46 U. S. C. § 688, which conferred on seamen a negligence remedy governed by "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees." In *Crowell v. Benson* the Court upheld the original Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq., which created a federal workmen's compensation scheme for longshoremen. In fact, except for legislation struck down for undermining the uniformity of maritime law, plaintiffs cannot cite us a single case in which a congressional enactment of substantive maritime law was declared unconstitutional.

Finally, we note that the Supreme Court has explicitly recognized the peculiar appropriateness of the legislative process to striking the correct balance of substantive maritime remedies. In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952), the Court held that since Congress had not approved a right of contribution between shipowners and shoreside contractors, the Court could not appropriately do so. In so holding, the Court said:

> We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run.

342 U. S. at 286; accord *United States v. Atlantic Mutual Insurance Co.*, 343 U. S. 236, 242 (1952). Our first opinion in this matter, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.*, 379 F. Supp. 759, 767-69 and appendix (E. D. Pa. 1974), discusses at length the shifting of weights, as revealed by the legislative history, which finally struck the balance represented by the 1972 Amend-

ments to the Longshoremen's and Harbor Workers' Compensation Act. After full legislative hearings at which representatives of all interested groups testified, Congress adjusted the previous balance of remedies toward the goal of a more humane and more equitable scheme. As we found in *Lucas I*, 379 F. Supp. at 766-67, the 1972 Amendments reveal themselves as a configuration in which the stevedore is strictly liable to his employee for increased workmen's compensation benefits. The stevedore, in turn, is protected against actions by shipowners for indemnity and contribution when a longshoreman is injured on the job through a shipowner's negligence. Finally, and this completes the configuration, the shipowner is no longer strictly liable to the longshoreman under the warranty of seaworthiness; only a simple, common-law negligence remedy remains available to the longshoreman against the shipowner. In light of our characterization of the 1972 Amendments, we note the recent case of *Burris v. Lavino Shipping Co.*, – F. 2d – (3d Cir. Oct. 30, 1974), Civil No. 74-1120, in which the Third Circuit, in dicta,[10] characterized the Amendments as:

> rationaliz[ing] the relative liabilities of shipowners and stevedores by replacing maritime concepts of liability with "a new cause of action for negligence in which a shipowner is not to be held liable as a third party unless the former's negligence was such as would render a land-based third party in non-maritime pursuits liable under similar circumstances" . . . .

(citation omitted).

10. In *Burris* the Third Circuit found that the 1972 Amendments did not apply because the accident giving rise to the action in federal court occurred prior to the effective date of the Amendments. *Burris v. Lavino Shipping Co.*, – F. 2d –, – and note 9 (3d Cir. 1974).

To summarize, then, we hold that in denying to longshoremen the right to recover under the warranty of seaworthiness in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Congress has exceeded its power neither under the Constitution nor under the constitutional interpretation found in *Panama Railway v. Johnson*. The caution sounded in *Panama* is against extreme congressional tampering with the boundaries of admiralty jurisdiction, either territorial or subject matter jurisdiction. We agree that Congress may not, constitutionally, bring under the jurisdiction of a federal admiralty court a completely land-based accident or transaction. Conversely, we concede that Congress cannot remove from admiralty jurisdiction those types of accidents which occur on navigable water since these are conceptually, traditionally, and constitutionally admiralty matters. This does not mean, however, that Congress may not amend or alter the substantive law of admiralty as long as it does not interfere with admiralty jurisdiction. Section 905(b) in no way encroaches upon the jurisdiction of the admiralty court; it merely defines rules of law to be applied. More specifically, the amendment provides that liability to a longshoreman may not be based upon the breach of the warranty of seaworthiness. It does not disturb the jurisdiction of a district court to entertain a suit by an injured longshoreman. Article III, section 2, does not reach the substantive law of admiralty but only the jurisdiction and the uniform application of its laws. Section 905(b) does nothing to either.

MOTION FOR CERTIFICATION.

Defendants-Third Party Plaintiffs move that we certify the constitutional question here decided to the Third Circuit. Section 1292(b) of Title 28 provides for such a

procedure but only when "there is substantial ground for difference of opinion and . . . an immediate appeal may materially advance the ultimate termination of the litigation." Since we find § 905(b) clearly constitutional, we necessarily find no "substantial ground for difference of opinion." Further, after this second long delay in the litigation occasioned by our preparing another memorandum resolving pretrial motions, we believe the best hope for "materially advanc[ing] the ultimate termination of the litigation" is to proceed with it in the district court.

CONDITIONAL MOTION FOR RECONSIDERATION.

Defendants-Third Party Plaintiffs move that in the event we find § 905(b) unconstitutional, we reconsider our decision in *Lucas I*. Obviously, we need not reconsider.

/s/ JOSEPH S. LORD, III,
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO,
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD,
Daniel H. Huyett, 3rd
J.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE
G.M.B.H. & CO., K.G.

v.

NORTHERN METAL COMPANY

CIVIL ACTION No. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL COMPANY

ORDER.

Now, January 21, 1975, upon consideration of plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) and the motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of August 5, 1974, and the motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, the contentions of the parties and memoranda filed, IT IS ORDERED that:

1. Plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) is DENIED;

2. The motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974 are DENIED; and

3. The motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, are DENIED.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Ch. J.

/s/ ALFRED L. LUONGO
Alfred L. Luongo
J.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd
J.